No. 93-480

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

Supreme Court, U.S.
FILED
SEP 24 1993
OFFICE OF THE CLERK

GARRY R. GONSALVES,

Petitioner,

v.

ESTHER GALLEGOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HOWARD A. SAGASER
JORY, PETERSON & SAGASER
555 West Shaw Avenue
Fresno, California 93704
(209) 225-6700

Counsel of Record for Petitioner

DENIS A. EYMIL
KINGS COUNTY GOVERNMENT
County Government Center
Hanford, California 93230
(209) 582-3211, Ext. 245

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. In resolving questions of qualified immunity for government officials under 42 U.S.C. Section 1983, is it proper for the court to inquire into alleged subjective reasons for an employment termination decision rather than relying on the objective reasonableness standard?

2. In determining qualified immunity, does a different subjective standard apply to claims arising under the First Amendment which allege that a public employee's exercise of the right of free speech resulted in employment retaliation rather than the objective standard articulated by the Supreme Court in Fourth Amendment cases such as *Hunter v. Bryant,* ____ U.S. ____, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)?

3. Is the Ninth Circuit decision in *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990), requiring inquiry into the motives of the employer underlying the termination and requiring a determination that improper motives did not constitute a substantial factor in the termination decision, still applicable to questions of qualified immunity for government officials in Section 1983 actions, particularly in light of the United States Supreme Court decision in *Hunter v. Bryant, supra,* 112 S.Ct. 534, which held that inquiry into subjective motivation was improper in a determination of qualified immunity?

4. Which is the proper standard to be utilized in determining qualified immunity in employment retaliation cases arising under the First Amendment, the objective reasonableness standard utilized by the First, Seventh and

Eighth Circuit Courts of Appeals[1] or the subjective inquiry into a public official's motive utilized by the Ninth Circuit Court of Appeals?

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[1]*See, e.g., Egger v. Phillips,* 710 F.2d 292 (7th Cir. 1983); *Quintero v. Aponte-Roque,* 974 F.2d 226 (1st Cir. 1992); *Bartlett v. C.E. Fisher,* 972 F.2d 911 (8th Cir. 1992).

PARTIES

The Petitioner is Garry R. Gonsalves who is the district attorney for Kings County, California, a political subdivision of the State of California.

The Respondent is Esther Gallegos, a former clerical employee of the Kings County District Attorney's office.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Garry R. Gonsalves respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 14, 1993, which holds (1) that claims of retaliatory termination under the First Amendment necessarily implicate the motives of the employer and (2) that the appropriate law to be followed in this case is *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990), which holds that summary judgment on qualified immunity grounds is inappropriate where there is a factual issue as to the employer's motive. Petitioner maintains the holding of the Ninth Circuit conflicts with the long line of cases issued by the Supreme Court starting with *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and reaffirmed more recently in *Hunter v. Bryant,* ____ U.S. ____, 112 S.Ct. 534,

116 L.Ed.2d 589 (1991), which uniformly hold that in a qualified immunity case the subjective intent (motive) of the public official is not at issue. Petitioner also maintains the holding of the Ninth Circuit allowing inquiry into the subjective intent of the public official conflicts with the holdings of other circuit courts which have used the objective standard articulated by this Court in *Hunter v. Bryant, supra,* ____ U.S. ____, 112 S.Ct. 534, 116 L.Ed.2d 589.

OPINIONS BELOW

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, not published, is reprinted in Appendix A. It affirms the denial of Petitioner's Motion for Summary Judgment based on qualified immunity by the United States District Court for the Eastern District of California, two Memoranda and Orders, not published, reprinted as Appendices B and C, respectively.

JURISDICTION

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit was entered on May 14, 1993, affirming the denial of Petitioner's Motion for Summary Judgment based on qualified immunity by the United States District Court, Eastern District of California, dated October 7, 1991 (Appendix B), and the denial of Petitioner's Motion for Reconsideration, dated November 18, 1991 (Appendix C). The denial of a motion for summary judgment on the grounds of qualified immunity is an appealable "final decision" within the meaning of 28 U.S.C. Section 1291, notwithstanding the absence of a final judgment.

The United States District Court, Eastern District of California, also denied Petitioner's request to consider a

limited remand on the issue of qualified immunity on February 14, 1992 (Appendix D).

The United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and for Rehearing En Banc, filed pursuant to Federal Rules of Appellate Procedure 40(a) and 35, in an Order issued July 2, 1993 (Appendix E). This Petition is filed within ninety days of July 2, 1993. The jurisdiction of this Court is invoked under 29 U.S.C. Section 1254(1).

STATUTES INVOLVED

The relevant statutory provision is the Civil Rights Act of 1871, 42 U.S.C. Section 1983. It is reprinted as Appendix G.

STATEMENT OF THE CASE

Summary of Facts

Plaintiff Esther Gallegos ("Plaintiff") was employed as a computer systems analyst in the Kings County District Attorney's office. She had access to all computer drives. In May 1990, after obtaining documents from the computer of Defendant Garry Gonsalves ("Gonsalves") allegedly showing that he had used county resources for private legal work, personal business and re-election campaign business, Plaintiff brought the information to the attention of a local newspaper and testified concerning the same to the Kings County Grand Jury.

When a reporter informed Gonsalves he had obtained confidential information from Plaintiff, Gonsalves initiated an office-wide internal investigation which revealed that Plaintiff improperly used information available in the county computer

system by, among other things, accessing the Department of Motor Vehicles' (DMV) computer line, changing documents, and providing the changed documents to various insurance companies. Plaintiff does not dispute any of this wrongdoing.

As recognized at pages 1 and 2 of the Ninth Circuit Decision, it is undisputed that Esther Gallegos, at work and using office equipment, engaged in the following misconduct:

> (1) Gallegos improperly accessed the computer of the California Department of Motor Vehicles ("DMV") for her own personal use, (2) Gallegos used the DMV computer to alter her children's driving histories, (3) Gallegos submitted altered driving histories to various insurance companies to obtain automobile insurance at preferred rates for her and her children, (4) Gallegos created and submitted altered insurance documents, which were kept and presumably used at work, to various insurance companies, and (5) Gallegos submitted altered insurance documents to clear no-proof-of-insurance citations for her daughter in municipal and juvenile court.[2]

When this wrongdoing was discovered, Plaintiff was placed on administrative leave on June 22, 1990. On July 5, 1990, Gonsalves met with County Counsel Denis Eymil and Deputy County Counsel Richard Wylie to discuss possible discipline to be taken against Plaintiff. Based on the discussions with and recommendations of Eymil and Wylie,

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[2]The misconduct referred to at pages 1 and 2 of the Ninth Circuit Decision is set forth in greater detail at page 3 of the District Court's Decision (Appendix B).

Gonsalves decided that Plaintiff should be terminated.[3] Plaintiff actually resigned her employment when given a proposed notice of intent to terminate. (Appendix B, pages 1 and 2.)

The District Court Decision

Plaintiff filed her original Complaint on July 12, 1990. Petitioner moved to dismiss the action on two occasions, each of which resulted in amendments to the Complaint. The Second Amended Complaint asserts claims for civil rights violations under 42 U.S.C. Section 1983 and intentional infliction of emotional distress. (Appendix F)

On July 19, 1991, Kings County and Gonsalves moved for summary judgment on the civil rights claim on the basis that (1) Gonsalves was qualifiedly immune from suit for terminating Plaintiff because he acted reasonably and had good cause for terminating her as a matter of law, and (2) the termination did not violate clearly established law. Gonsalves moved for summary judgment on the emotional distress claim on the same grounds, plus the fact that he did not engage in outrageous conduct or intend to cause Plaintiff emotional distress.

On October 7, 1991, after a hearing on the motion and the filing of supplemental briefs, the district court (The Honorable Robert Coyle) granted summary judgment on the emotional distress claim. The court denied summary

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[3]The decision to terminate Plaintiff was influenced by discussions with Eymil and Wylie concerning the decision in *Martinez v. County of Tulare,* 190 Cal.App.3d 1430, 235 Cal.Rptr. 851 (1987), a case in which the state court found that the county was required to fire the employee for misconduct similar to that committed by Plaintiff.

judgment on the civil rights claim finding that, although it was a close question, qualified immunity was not established because there was a triable issue of fact as to Gonsalves' motive in terminating Plaintiff. (Appendix B)

The district court's decision was premised on applicability of the holding in the Ninth Circuit's decision in *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990). In *Burgess,* the Ninth Circuit held that summary judgment on the basis of qualified immunity is appropriately denied if there are genuine issues of material fact as to whether the plaintiff's protected activities were a substantial factor in the discharge.

On November 4, 1991, Gonsalves moved for reconsideration of the qualified immunity issue on grounds that Gonsalves' termination of Plaintiff was not objectively unreasonable in light of the fact that it was not clear that Plaintiff's speech was directed to a matter of public concern and, therefore, constitutionally protected. Petitioner also requested that the district court consider the fact that Gonsalves relied on the advice of the County Counsel in terminating Plaintiff as evidence of Gonsalves' entitlement to good faith immunity.

Gonsalves filed a timely Notice of Appeal based upon the defense of qualified immunity on November 5, 1991.

On November 19, 1991, the district court denied the Motion for Reconsideration stating that consultation with counsel prior to the termination of Plaintiff did not *ipso facto* entitle Gonsalves to qualified immunity. The court restated its opinion that the Ninth Circuit's decision in *Burgess v. Pierce County, supra,* 918 F.2d 104, precluded granting summary judgment on the issue of qualified immunity in a mixed motive case. (Appendix C) The district court also denied the Motion for Leave to Certify the Denial of Summary Judgment as Appealable Pursuant to 28 U.S.C. Section 1292(b), noting that the Ninth Circuit had jurisdiction, pursuant to 28 U.S.C.

Section 1291, of an interlocutory appeal from the denial of summary judgment in a civil rights action based on qualified immunity.

On January 2, 1992, Gonsalves filed a Motion to Remand in the Ninth Circuit Court of Appeals, seeking remand of the decision in light of the United States Supreme Court decision in *Hunter v. Bryant,* ___ U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). At the request of the Ninth Circuit Pre-Briefing Conference Attorney, Gonsalves sent a request to the district court on February 4, 1992, to consider a limited remand in light of *Hunter v. Bryant.* On February 12, 1992, the district court issued an order denying the request to consider remand.

The Ninth Circuit Court of Appeals Decision

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit on the grounds that summary judgment should be granted on the basis that Gonsalves was entitled to qualified immunity. The Court of Appeals affirmed the decision of the district court on the grounds that the Ninth Circuit's decision in *Burgess v. Pierce County, supra,* 918 F.2d 104, was controlling and that summary judgment on qualified immunity grounds was inappropriate where there is a factual issue as to whether termination would have taken place regardless of constitutionally protected speech. The Ninth Circuit, in determining that *Burgess* controlled under the facts of this case, distinguished the more recent Supreme Court decision in *Hunter v. Bryant, supra,* 112 S.Ct. 534, on the basis that *Hunter* involved the Fourth Amendment. The Ninth Circuit panel stated that claims of retaliatory termination under the First Amendment necessarily implicate the motives of the employer. This is an unpublished Memorandum Decision issued on May 14, 1993. (Appendix A)

Petitioner filed a Motion for Rehearing and for Rehearing En Banc pursuant to Federal Rules of Appellate

Procedure 40(a) and 35 on May 26, 1993. The Ninth Circuit issued an Order denying the Petition for Rehearing and Rehearing En Banc on July 2, 1993. (Appendix E)

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit, Ignoring the Clear Language of *Hunter v. Bryant*, Has Carved Out a Motive Exception for Employment Cases

The Ninth Circuit's Decision in *Gonsalves v. Gallegos*, No. 91-16759, Memorandum Opinion and Order (9th Cir. May 14, 1993) (Appendix A), attempts to carve out an employment case exception from the line of United States Supreme Court decisions pertaining to the objective reasonableness standard for qualified immunity. Therefore, the reasoning and validity of the Ninth Circuit's Decision should be reviewed by this Court as it conflicts with previous decisions of this Court and decisions issued by other circuit courts of appeals.

The doctrine of qualified immunity reflects the fundamental judgment that the public interest is not served by imposing damage liability on public servants for good faith performance of their discretionary duties. Interjecting the subjective factor of the motive for a discharge in a qualified immunity setting has important policy ramifications. It is Petitioner's position that if motive is allowed to be interjected into the qualified immunity analysis, public officials will essentially be stripped of qualified immunity whenever they engage in employment disciplinary actions. This is precisely the fear expressed by this Court in *Harlow v. Fitzgerald*, *supra*, 457 U.S. 800. Claims involving public officials' individual liability for exercising discretionary employment disciplinary actions will be routinely placed before a jury. This will result in paralysis of effective supervision of public employees.

During oral argument, the Ninth Circuit panel expressed concerns about the policy ramifications if inquiry into the official's motive was not allowed in employment cases involving issues of qualified immunity. For the same reasons that motive is not an issue in search and seizure cases, police misconduct cases and other constitutional claims not involving employment rights, motive is likewise not relevant to cases involving First Amendment employment discrimination claims under 42 U.S.C. Section 1983. In *Harlow v. Fitzgerald, supra,* 457 U.S. at 819, this Court in eliminating subjective factors from the qualified immunity analysis, recognized that the public interest in deterrence of unlawful conduct and compensation of victims, remains protected by a test that focuses on the objective legal reasonableness of an official's act.

An official cannot escape personal liability if his or her conduct is objectively unreasonable. Just as a police officer is subjected to personal liability in making an unlawful arrest if he does not proceed on a basis that is objectively reasonable, a public official who arbitrarily and capriciously terminates an employee likewise would remain individually liable under the objective reasonableness test. The Ninth Circuit in recent decisions has recognized that motive is not a proper factor in a qualified immunity analysis involving improper arrests and/or searches by police officers. *See, e.g., Act Up!/Portland v. Bagley,* 988 F.2d 868 (9th Cir. 1993); *Hemphill v. Kincheloe,* 987 F.2d 589 (9th Cir., 1993); and *Tachiquin v. Stowell,* 789 F.Supp. 1512, (E.D. CA 1992). The Ninth Circuit's persistence in distinguishing employment cases and allowing inquiry into the motive underlying the employment decision prior to a grant of summary judgment on the basis of qualified immunity is incorrect and improper.

Applying the objective reasonableness test and eliminating the issue of motive in Fourth Amendment cases has not led to a plethora of civil rights abuses by police officers. Likewise, applying the same objective

reasonableness standard to the employment context will not result in a plethora of employment termination abuses. Rather, public officials engaged in supervision and discipline of employees will be free to act and know they are not subject to personal liability so long as they act in an objectively reasonable manner. Unless the objective reasonableness test is utilized in employment cases, it will be impossible to get qualified individuals to serve in public offices if every time an official terminates or disciplines an employee, he or she faces the hazards of a lawsuit alleging personal liability under 42 U.S.C. Section 1983 because their motives can be placed at issue before a jury.

B. The Ninth Circuit Decision Conflicts With Decisions Issued by the First, Seventh and Eighth Circuit Courts of Appeal

This Court should grant this Petition in order to resolve the conflict which currently exists in the circuit courts of appeals as to whether inquiry into motive is proper in qualified immunity determinations involved in employment cases. The Seventh Circuit has held that an official's subjective motivation for an employment decision was not at issue in determining whether the official was entitled to qualified immunity. *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983). Similarly, the First Circuit has focused inquiry in employment-related qualified immunity cases on whether the official's conduct was objectively unreasonable under existing law. *Quintero v. Aponte-Roque*, 974 F.2d 226 (1st Cir. 1992). The Eighth Circuit also refused to consider motive in granting qualified immunity to a government official in an employee discipline case. *Bartlett v. C.E. Fisher*, 972 F.2d 911 (8th Cir. 1992).

These circuit court decisions are directly in conflict with the Ninth Circuit's decision in *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990) and the Ninth Circuit's Decision in the case at issue in this Petition, *Gonsalves v. Gallegos*.

These Ninth Circuit decisions required the lower court to determine that improper motive was not a substantial factor in the employment decision prior to a grant of summary judgment on the basis of qualified immunity. It is necessary to resolve this conflict between the circuit courts in order to insure that the doctrine of qualified immunity is consistently applied throughout the United States.

C. The Misconduct of the Employee Is Undisputed

This case is ideal for resolving this dispute as to whether inquiry into motive should be part of a determination of qualified immunity for a discretionary employment decision by a government official. Respondent does not dispute that she committed the misdeeds that resulted in her termination. Therefore, this Court can focus on the propriety of an inquiry into motive in a situation where there is no dispute the terminated employee engaged in severe misconduct.

THE NINTH CIRCUIT'S DECISION IMPROPERLY RULED THAT IN RESOLVING ISSUES OF QUALIFIED IMMUNITY UNDER 42 U.S.C. SECTION 1983, THE COURT MAY INQUIRE INTO THE ALLEGED SUBJECTIVE REASONS FOR THE EMPLOYMENT TERMINATION IN DIRECT CONTRADICTION OF U.S. SUPREME COURT DECISIONS AND IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

A. The U.S. Supreme Court Has Repeatedly Stated That Inquiry Into the Subjective Intent of a Public Official Is Inappropriate–The Proper Inquiry Is the Objective Reasonableness of the Public Official's Act

A reading of the various United States Supreme Court cases on the issue of qualified immunity leaves one unmistakable conclusion. The relevant inquiry is whether the

public official's conduct violated clearly established statutory or constitutional rights which a reasonable person would have known. Significantly absent from the Ninth Circuit's Decision in *Gonsalves v. Gallegos* (Appendix A) is any analysis of the objective reasonableness of the termination in light of the undisputed misconduct of Esther Gallegos.[4]

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court, in the first of a series of decisions, made it clear that subjective elements such as motive for the official's questioned action are not part of the inquiry in a qualified immunity defense arising under 42 U.S.C. Section 1983. At 457 U.S. 815-816, this Court in *Harlow* noted:

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz*[5] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

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[4]The undisputed facts establish that the grounds for Plaintiff's discharge as set forth in the dismissal notice were completely unrelated to her statements regarding Gonsalves. They all relate to her misconduct in misusing the Kings County and Department of Motor Vehicles' computer systems, falsifying documents at her workplace, making false representations and providing false documents in the fraudulent procurement of insurance policies, and making misrepresentations in court documents and proceedings.

[5]*Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

It is significant that the decision in *Harlow v. Fitzgerald* was issued approximately five years after this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In fact, this Court has never followed a mixed-motive subjective intent analysis in resolving issues of qualified immunity under 42 U.S.C. Section 1983.

In *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), in an employment discharge case, this Court once again reiterated that inquiry into the official's subjective state of mind is not at issue in a qualified immunity case. The decision in *Davis v. Scherer* is particularly relevant in light of the Ninth Circuit's attempts to distinguish *Hunter v. Bryant, supra,* 112 S.Ct.534, on the basis that *Hunter* was a Fourth Amendment case and did not involve an employment termination matter. The Ninth Circuit panel decision in *Gonsalves v. Gallegos,* No. 91-16759, Memorandum Opinion and Order, at pages 3 and 4 (9th Cir. May 14, 1993) (Appendix A) states: "[c]laims of retaliatory termination under the First Amendment, unlike issues of probable cause under the Fourth Amendment, necessarily implicate the motives of the employer."

In *Davis v. Scherer,* the issue was whether or not a highway patrolman was properly discharged because he engaged in outside employment in conflict with the Florida Highway Patrol Department rules. In finding that qualified immunity existed for the employment termination, this Court stated at 468 U.S. 191:

> *Harlow v. Fitzgerald, supra,* rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' 457 U.S. at 818, 102 S.Ct. at 2739. Whether

> an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *Ibid.* (Footnote deleted). No other 'circumstances' are relevant to the issue of qualified immunity.

The objective reasonableness standard was reaffirmed by this Court in a qualified immunity case in 1985 in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). At 472 U.S. 517, the Court once again rejected a subjective factor analysis stating:

> At the same time, the court reconsidered its ruling on qualified immunity in light of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), in which this Court purged qualified immunity doctrine of its subjective components and held that 'government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' (Emphasis added.)

Notwithstanding the clear language of this Court that it has purged the qualified immunity doctrine of its subjective components such as motive, the Ninth Circuit's Decision has improperly interjected subjective components in the present case by stating that qualified immunity is not available to District Attorney Garry Gonsalves because issues arise as to his "motive." In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), this Court once again stated the appropriate inquiry is the objective reasonableness of the public official's conduct based upon the information available to the public official, rather than inquiry into the subjective intent behind the public official's action. See *Anderson v. Creighton*, 483 U.S. at 641, 107 S.Ct. at 3040.

In *Hunter v. Bryant,* ____U.S.____, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), this Court, in reversing the Ninth Circuit, once again reaffirmed the longstanding doctrine that, in a qualified immunity case, the subjective intent (motive) of the public official is not at issue.

B. **The Circuit Panel Decision Improperly Relied on *Burgess v. Pierce County* Which Was Impliedly Overruled by *Hunter v. Bryant***

The major flaw in the Ninth Circuit's Decision is the continued reliance upon *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990). One of the reasons why the Petition for a Writ of Certiorari should be granted in this case is to allow determination of whether *Burgess v. Pierce County, supra*, 918 F.2d 104, should still be the law of the Ninth Circuit in light of this Court's subsequent decision in *Hunter v. Bryant, supra*, 112 S.Ct. 534. Petitioner Garry Gonsalves submits that *Burgess v. Pierce County, supra*, 918 F.2d 104, is no longer good law and should not be used by panels of the Ninth Circuit or district courts in the Ninth Circuit in subsequent decisions.

Because of the continued controversy involving the issue of qualified immunity in the employment context, the United States Supreme Court should clarify whether motive, as a subjective factor, should be interjected into the issue of qualified immunity in a case arising under 42 U.S.C. Section 1983.

The Ninth Circuit in *Burgess v. Pierce County, supra*, 918 F.2d.104, failed to address this Court's decision in *Davis v. Scherer, supra*, 468 U.S. 191, 104 S.Ct. 3012. *Davis v. Scherer* held that inquiry into the state of mind of the terminating official in an employment discharge case was improper in determining whether or not an official may prevail in this qualified immunity defense. Therefore, it is submitted that reliance upon *Burgess v. Pierce County* was improper

after the U.S. Supreme Court reaffirmed its holding in *Davis v. Scherer* in its 1991 decision in *Hunter v. Bryant, supra*, 112 S.Ct. 534.

Hunter holds that summary judgment on the issue of qualified immunity must be granted if the defendant acts reasonably, even if it turns out he or she is mistaken. Once it is determined that the defendant's action is reasonable and does not violate clearly established law, the inquiry ends and the defendant's motives are not at issue. This is very different from the *Burgess* standard where the focus shifts to the defendant's motives, a factual issue not often resolved on a motion for summary judgment, and one that significantly dilutes the qualified immunity doctrine.

In *Hunter*, respondent James Bryant delivered photocopies of a handwritten letter to the University of Southern California referring to a plot to assassinate President Reagan. Secret Service agents Brian Hunter and Jeffrey Jordan investigated the incident. They went to Bryant's home, and he gave them permission to enter and make a search. The home was searched and Bryant was arrested for making threats against the President in violation of 18 U.S.C. Section 871(a). Bryant was arraigned and held without bail until the criminal complaint was dismissed on the government's motion two weeks later.

Bryant brought a civil action against Hunter, Jordan, the Treasury Department and the Director of the Secret Service seeking recovery under the Federal Tort Claims Act and violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments. The district court dismissed all defendants except Hunter and Jordan. The court denied a motion for summary judgment on qualified immunity grounds.

On appeal, a Ninth Circuit panel held that the agents were entitled to qualified immunity for arresting Bryant without a warrant since the warrant requirement was not clearly

established for situations where the arrestee consented to the agents' entry into the residence. The panel divided, however, on whether the agents were entitled to qualified immunity on the claim they arrested Bryant without probable cause. The majority concluded that the agents did not sustain the burden of establishing qualified immunity because their reason (i.e. motive) for arresting Bryant, that the letter authorized by Bryant was a threat against the President, was not the most reasonable reading of Bryant's letter. *Hunter*, 112 S.Ct. at 536. The Ninth Circuit stated "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." *Id.* at 536-537.

This Court reversed the Ninth Circuit decision. It held that the rule used by the Ninth Circuit panel inquiring into the officers' motives was improper because (1) it "routinely places the question of immunity in the hands of the jury" and (2) the "court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Id.* at 537.

The Supreme Court explained that the proper standard for qualified immunity shields officers from liability from suit if a "'reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.'" *Id.* at 536-537 (quoting *Anderson v. Creighton, supra*, 483 U.S. 635, 641) (brackets in original). The Court specifically noted that "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity" and that the "qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Ibid.* (quoting *Anderson v. Creighton, supra*, 483 U.S. 635, 641 and *Malley v. Briggs,*

475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)). The Court concluded that this "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* at 537 (quoting *Davis v. Scherer, supra,* 468 U.S. at 196).

Hunter clearly establishes that a motion for summary judgment on the basis of qualified immunity must be granted if a government agent acts reasonably in light of clearly established law and the information he or she possesses at the time the action is taken. This is true even if the officer turns out to be mistaken, so long as his or her action was reasonable.

This makes the *Burgess* motive inquiry improper. The Ninth Circuit's continued reliance on *Burgess* in determining whether Gonsalves is entitled to qualified immunity is incorrect. This Court should clarify that inquiry into subjective motivation is improper in any determination of the issue of qualified immunity and cases involving claims of employment discrimination allegedly impacting an employee's First Amendment rights do not require a different standard of inquiry.

C. Other Circuits in Applying the Qualified Immunity Test in an Employment Termination Context, Both Before and After *Hunter v. Bryant*, Have Held That the Official's Motive Is Not at Issue in Employment Discipline Cases

The Seventh Circuit in *Egger v. Phillips*, 710 F.2d 292 (1983), applying *Harlow v. Fitzgerald, supra,* reached a conclusion totally inapposite with the Ninth Circuit's ruling in *Burgess v. Pierce County, supra,* 918 F.2d.104. In *Egger v. Phillips,* a former FBI agent brought suit against his former superior seeking damages based on allegations that his transfer and subsequent

discharge were taken in violation of his constitutional rights, including his right of free speech.

In *Egger v. Phillips, supra*, in finding the official was entitled to the defense of qualified immunity, the Seventh Circuit unequivocally stated at 710 F.2d 292, 314, that the public official's subjective motivation for the employment decision was not relevant to the qualified immunity question. Therefore, the discharged employee's contention that his discharge was maliciously motivated was not an issue regarding the question of qualified immunity. Rather, the Seventh Circuit properly noted in *Egger v. Phillips*, the question was whether the public official could have been reasonably expected to know at the time he made his recommendation that the Constitution forbade his actions. *Egger v. Phillips*, 710 F.2d at 315.

In the present case, District Attorney Garry Gonsalves, who relied upon the independent advice of the County Counsel for Kings County,[6] could not reasonably have been expected to know that the termination of Esther Gallegos for her admitted misconduct would violate the Constitution.

In *Quintero v. Aponte-Roque,* 974 F.2d 226 (1st Cir. 1992), the First Circuit in upholding the district court's finding of qualified immunity in an employment discharge case citing *Davis v. Scherer, supra*, held that the inquiry is not whether the defendant's conduct actually abridged the plaintiff's constitutional rights. The First Circuit held that the fact that a violation occurred is not enough to pierce the shield of qualified immunity "unless it is further demonstrated that the defendant's conduct was unreasonable under the applicable

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[6]*See Tubbesing v. Arnold,* 742 F.2d 401 (8th Cir. 1984). [Reliance on advice of counsel factor regarding objective reasonableness.]

standard." *Quintero v. Aponte-Roque*, 974 F.2d at 228, quoting *Davis v. Scherer, supra,* 468 U.S. 183, 190.

In *Bartlett v. C. E. Fisher*, 972 F.2d 911 (8th Cir. 1992), the Eighth Circuit, in an employment discipline case involving First Amendment rights, held the official who suspended the plaintiff was entitled to qualified immunity. In *Bartlett*, a Missouri state highway patrol trooper alleged that his 25-day employment suspension was in retaliation for his exercise of his First Amendment rights by complaining to the state governor and three state senators about a "work quota system." In upholding the finding that the officials who suspended the plaintiff were entitled to qualified immunity, the Eighth Circuit noted at 972 F.2d 916 that the Supreme Court in *Harlow v. Fitzgerald, supra*, eliminated inquiry into the actual motivation of the official. *See also Guercio v. Brody,* 911 F.2d 1179 (6th Cir. 1990); *Noyola v. Texas Department of Human Resources,* 846 F.2d 1021 (5th Cir. 1988); and *Benson v. Allphin,* 786 F.2d 268 (7th Cir. 1986).

CONCLUSION

The doctrine of qualified immunity was established to allow government officials to make discretionary decisions without fear of harassment in having to defend themselves against lawsuits questioning these decisions. This Court, in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), adopted the objective reasonableness standard in an effort to insure that the question of qualified immunity would be decided prior to trial whenever possible.

The Decision of the Ninth Circuit Court of Appeals in *Gonsalves v. Gallegos* (Appendix A), at issue in this Petition, holding that the standard developed in *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990) controls in employment cases severely undermines this policy determination. The continued application by the Ninth Circuit of the holding in

Burgess requiring inquiry into the motivation of officials in employment decisions prior to a grant of summary judgment on the basis of qualified immunity, effectively denies the possibility of summary judgment in the majority of employment cases. As this Court explained in rejecting inquiry into subjective motivation in qualified immunity analysis and establishing the objective reasonableness standard in *Harlow v. Fitzgerald, supra,* 457 U.S. 800, 815-186, an official's subjective motivation is a question of fact which is difficult to resolve in a summary judgment motion.

This Court should grant this Petition in order to clarify the conflict between the circuit courts of appeals as to *whether an inquiry into the subjective motive underlying a government official's employment decision should be part of* a qualified immunity determination. Granting this Petition would allow the Court to affirmatively establish that the objective reasonableness standard applies to qualified immunity decisions in employment cases as well as in Fourth Amendment cases. This Petition should be granted in order to overrule the Ninth Circuit's holding in *Burgess v. Pierce County,* 918 F.2d 104 (9th Cir. 1990) and to clarify that the objective reasonableness standard for qualified immunity prevents inquiry into an official's motive in making an employment decision.

Respectfully submitted,

HOWARD A. SAGASER

DENIS A. EYMIL

Attorneys for Petitioner

September 23, 1993

APPENDIX A

Memorandum*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16759

GARRY S. GONSALVES,[1]

Plaintiff/Appellant,

v.

ESTHER GALLEGOS,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Robert E. Coyle, District Judge, Presiding

Argued and Submitted: April 15, 1993

Filed: May 14, 1993

Before: MARY M. SCHROEDER, HARRY PREGERSON, and DOROTHY W. NELSON, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1]Appellant's actual name is Garry R. Gonsalves.

Garry Gonsalves, the district attorney for Kings County, California, appeals the district court's denial of his motion for summary judgment based on qualified immunity. Esther Gallegos sued Gonsalves under 42 U.S.C. §1983 alleging that Gonsalves terminated her in retaliation for exercising her First Amendment rights after Gallegos leaked information to the press stating that Gonsalves had misused government property. Gonsalves argues that Gallegos was terminated after an investigation revealed she had misused the office computer system to alter the driving records of her children in order to receive lower insurance rates. It is undisputed that Gallegos engaged in this conduct. Rather, the central factual dispute is whether Gonsalves would have fired Gallegos for misusing the computers regardless of her having leaked information to the local newspaper.

The district court denied Gonsalves' motion for summary judgment. The district court first ruled that Gallegos had presented a cognizable claim in federal court because her speech involved a matter of public concern under *Connick v. Myers*, 461 U.S. 138, 148 (1983). Recognizing that this case is governed by the mixed-motive standard set forth in *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the court then ruled that there was a genuine issue of material fact as to whether the expression was a "substantial" or "motivating" factor in the employer's decision. Finally, the court rejected Gonsalves' motion for summary judgment based on qualified immunity, relying on *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990). In *Burgess*, we held that summary judgment on qualified immunity grounds was inappropriate where there was a factual issue as to whether termination would have taken place regardless of constitutionally protected speech. Similarly, the district court ruled that unresolved material issues of fact relating to the motive for termination existed in this case.

The only question before this court in this interlocutory appeal is whether the district court properly rejected

Gonsalves' summary judgment motion based on qualified immunity. Government officials are entitled to government immunity when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). Here there is no dispute that the law was clearly established: A public employee may not be terminated for engaging in constitutionally protected conduct like the speech involved in this case. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1980).

Instead, Gonsalves centers his appeal on the contention that questions concerning qualified immunity should be resolved prior to suit. Gonsalves relies on a long list of decisions emphasizing that immunity is an entitlement "from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Specifically, Gonsalves argues that the district court improperly relied on *Burgess* in light of the more recent Supreme Court decision in *Hunter v. Bryant*, 112 S.Ct. 534 (1991). The Supreme Court there said: "Immunity ordinarily should be decided by the court before trial." *Hunter*, 112 S.Ct. at 537. The Court concluded that the real question is "whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Id.*

Gonsalves' reliance on *Hunter* is misplaced. *Hunter* involved the Fourth Amendment, i.e., whether the officers in that case had probable cause to arrest. Claims of retaliatory termination under the First Amendment, unlike issues of probable cause under the Fourth Amendment, necessarily implicate the motives of the employer. The qualified immunity test "does not rule out the need to inquire into the actual reasons behind an official's conduct when the official's state of mind is a necessary component of the constitutional violation he allegedly committed." *Feliciano-Angulo v. Rivera-*

Cruz, 858 F.2d 40, 45 (1st Cir. 1988); see also *Burgess*, 918 F.2d at 107; *Gutierrez v. Mun. Court of Southeast Judicial District*, 838 F.2d 1031, 1051 (9th Cir. 1988) (qualified immunity unavailable because "where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed"). *Burgess* remains the law we must follow in this case.

Accordingly, the district court's denial of Gonsalves' motion for summary judgment is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-90-438 REC

ESTHER GALLEGOS,

Plaintiff,

v.

GARRY R. GONSALVES, *et al.*,

Defendant.

ORDER RE MOTION FOR SUMMARY JUDGMENT

On September 9, 1991, the court heard Defendants' Motion for Summary Judgment.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion in part and denies it in part for the reasons set forth herein.

In Plaintiff's Second Amended Complaint, she alleges two causes of action. The first cause of action is alleged against Defendants Garry R. Gonsalves, the District Attorney for Kings County, and Kings County for violation of 42 U.S.C. §1983 by forcing Plaintiff to resign her position with the Kings County District Attorney's Office as Legal Clerk III in retaliation for the exercise of her First Amendment right by testifying before the Kings County Grand Jury and by stating to the Hanford *Sentinel* that Gonsalves had improperly used the resources of Kings County for his own personal gain. The

second cause of action is alleged against Gonsalves only and is a pendent claim for intentional infliction of emotional distress by the doing or causing to be done of certain actions enumerated in paragraph 21 of the Second Amended Complaint.

A. First Cause of Action

Defendants move for summary judgment in their favor in connection with the first cause of action on the ground that Plaintiff did not engage in activity protected under the First Amendment, that good cause existed for Plaintiff's termination, and that they are entitled to qualified immunity as a matter of law.

Plaintiff was employed as the computer systems analyst by the Kings County District Attorney's Office. She had access to all computer drives including confidential ones. In May, 1990, after obtaining documents from District Attorney Garry Gonsalves' computer tending to show that Gonsalves had used county resources for private legal work, personal business and re-election campaign business, Plaintiff brought the information to the Hanford *Sentinel* and testified concerning these documents to the Kings County Grand Jury. During this time, Gonsalves was running for re-election and was re-elected on June 5, 1990. On May 17, 1990, Glen Faison, a reporter from the *Sentinel*, interviewed Gonsalves and informed Gonsalves that he had received documents regarding inappropriate use of the computer system by the District Attorney and asking him if he knew anything about it. Gonsalves immediately started an internal investigation and determined that the employee must have been Plaintiff. On May 18, 1990, the article appeared in the *Sentinel*. Plaintiff was sent home on administrative leave on May 19, 1990, for the following week. She was given limited access to computers and removed from her position as systems manager. Gonsalves was heard to say that he would take care of Esther. Sometime during the week that Plaintiff

returned to work, Gonsalves asked Kings County Counsel Denis Eymil if there was some disciplinary action he could take against Plaintiff for her disloyalty. Eymil told Gonsalves that there was not, but to conduct an investigation to determine whether or not Plaintiff was guilty of some conduct for which disciplinary action could be taken. At this time, Eymil had no evidence of wrongdoing by Plaintiff. Gonsalves instructed Deputy District Attorney David Lee to conduct an investigation into Plaintiff's use of the county computer system. This investigation, which continued into late June/early July, revealed evidence that Plaintiff has improperly accessed the Department of Motor Vehicles computer line, had changed documents, and had provided those changed documents to various insurance companies. On July 6, 1990, Kings County served notice that they intended to terminate Plaintiff's employment because of the actions revealed by this investigation. Plaintiff thereupon resigned.

1. **Matter of Public Concern**

The determination of the protected status of speech is one of law, not fact. *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983)[1] In *Connick*, the Supreme Court explained:

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[1]Citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) and *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), defendants argue that the determination whether the speech is protected involves a balancing of the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state as an employer in promoting the efficiency of the public service it performs through its employees. Defendants then list a series of factors set forth in *Rankin* to be considered by the court in performing this balancing. However, it is clear from these Supreme Court cases that the speech at issue was protected, i.e., it did involve a matter of public concern. The portions of the decisions cited were addressing the determination of whether the State had legitimate grounds for discharging the employee. "Only where the asserted speech touches upon matters

> We . . . hold that when a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual of circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior . . . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.
>
> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Although Plaintiff suggest that motive is irrelevant to this determination, recent authority from the Ninth Circuit holds to the contrary. "One critical inquiry is whether the employee spoke in order to bring wrongdoing to light or merely to further some purely private interest . . . [H]owever, . . . motive should not be used as a litmus test for public concern; rather, 'content is the greatest single factor in the *Connick* inquiry.'" *Havekost v. U.S. Dept. of Navy*, 925 F.2d 316, 318 (9th Cir. 1991).

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of political, social, or other concern to the community must the court employ a balancing test to determine whether the speech is constitutionally protected." *Berg v. Hunter*, 854 F.2d 238, 241 (7th Cir. 1988), *cert denied*, 489 U.S. 1053 (1989).

Here, Defendants argue that Plaintiff's speech did not address a matter of public concern primarily because it is uncontested that Plaintiff herself had committed serious misdeeds in the workplace involving use of the DMV and Kings County computer systems and equipment.

The court cannot accept the logic of this argument. The fact that Plaintiff was guilty of misconduct similar to that with which she charged Gonsalves does not negate the public aspect of charges of misuse of public equipment and funds.

The initial form of the speech was an interview with the *Sentinel*. The *Sentinel* eventually persuaded Plaintiff to testify concerning this matter before the Grand Jury. The content of the speech was a charge that Gonsalves, who was running for re-election, had used the Kings County computer for personal reasons on County time. With respect to the context of the speech, Plaintiff testified in her deposition as follows:

> Q. Why didn't you do something about it then [two years before testifying to the Grand Jury]?
>
> . . .
>
> A. Because the situation was not as intolerable then as it was when I went to the Grand Jury. Not just that situation, the entire office situation.
>
> Q. What entire office situation?
>
> A. . The staff morale. The staff case load. The treatment of staff.
>
> Q. So you're saying you went to the Grand Jury because of the treatment of the staff; is that correct?

A. Yes.

Q. Which staff?

A. The criminal staff. The clerical criminal staff.

Q. And what exactly did this treatment involve? What kind of treatment was it that you felt you had to go to the Grand Jury with this information regarding Mr. Gonsalves? What was he doing to them?

A. He was playing favorites for those that were backing his political campaign.

. . .

Q. When you went to them and talked to the Grand Jury, did you raise these other issues which you haven't listed here with them?

A. No, not that I can remember.

Q. Well, if you didn't tell them about it, how could you tell they weren't interested?

A. Because of the items I had already discussed with them.

Q. And their attitude was?

A. They made the statement several times that they would not get involved during the campaign.

Q. Did you feel it was important to raise the issues during the campaign?

A. When I raised the issue it had nothing to do with the campaign. Other than the fact that it had been brought into the office.

Q. Did you want Mr. Gonsalves to be re-elected?

A. I hoped he wouldn't be.

Q. Why is that?

A. Because he was a lousy District Attorney.

Q. What was your reason for going to the Grand Jury at that particular time?

A. Because of all the dissension and distress he was causing in the office among the employees, the unhappiness, the fighting and the bickering that was breaking out within the criminal clerical unit. They had always worked as a team. The backlog of work and no assistance. And no prospect of getting anything addressed.

Defendants argue that Plaintiff's speech was not directed to a matter of public concern because it was clear that she was unhappy with the office environment and her boss and she made derogatory comments about him just before the election in an attempt to cause his defeat.

Although this issue is very close, on balance the court concludes that Plaintiff's charges to the newspaper and the Grand Jury about the district attorney's misuse of public funds and equipment in an election year to be a matter of public concern. As explained in *Havekost*, it is the content of the speech, not its motivation that is critical. Although Plaintiff's motivation for making the statements may have been work-related grievances, the content of her speech was not so related.

Accordingly, Defendants' motion for summary judgment is denied on this ground. The court rules as a matter of law that Plaintiff's speech involved a matter of public concern.

2. Legitimate Ground for Termination

Because Plaintiff's speech involved a matter of public concern, the next issue to be resolved is whether Defendants are entitled to summary judgment that Plaintiff would have been terminated despite her exercise of her First Amendment right.

In *Thomas v. Douglas*, 877 F.2d 1428, 1431 (9th Cir. 1989), the Ninth Circuit, citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-287 (1977), explains the standards governing a mixed-motive termination case involving the exercise of First Amendment rights:

> In *Mt. Healthy* . . . , the Supreme Court held it is the public employee's burden to show that his constitutionally protected expression was a 'substantial' or 'motivating' factor in his employer's adverse decision or conduct . . . Once the employee satisfies his burden, the employer must show by a preponderance of the evidence that it would have reached the same decision or that it would have engaged in the same conduct even in the absence of the protected expression . . . .

Plaintiff relies on *Sischo-Nownjead v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991) in contending that because she has made out a prima facie inference of impermissible motive in her termination, Defendants cannot rely on evidence that provides a legitimate reason for her termination in obtaining summary judgment.

However, as Defendants respond, *Sischo-Nownjead* because [sic] was not a mixed motive case. Moreover, Plaintiff has not disputed that she engaged in the actions ostensibly leading to her dismissal.

Again, although the issue is very close, the court is persuaded that there are genuine issues of material fact concerning the reasons for Plaintiff's termination. Under these circumstances, summary judgment is not appropriate. *See Gillette v. Delmore*, 886 F.2d 1194, 1198 (9th Cir. 1989).

3. **Qualified Immunity**

State and local officials are entitled to qualified immunity from liability for damages under Section 1983 if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Challenged conduct violates clearly established rights only if the unlawfulness of the conduct was apparent in light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether the law was clearly established is a question of law. *Finkelstein v. Bergna*, 881 F.2d 702, 703 (9th Cir. 1989).

In asserting that they are entitled to qualified immunity, Defendants focus almost exclusively upon the assertion that there was legitimate grounds to terminate Plaintiff because of her own misuse of government computers.[2]

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[2]Defendants repeatedly refer the court to a case, *Martinez v. County of Tulare*, 190 Cal.App.3d (1987) as upholding the termination of a public employee in the face of constitutional challenges and as constituting persuasive authority that defendants' actions herein are entitled to qualified immunity. *Martinez* is not relevant to this action. The constitutional issue involved in *Martinez* was whether a personnel rule that the plaintiff

The Ninth Circuit decision in *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990) is dispositive of this issue. In *Burgess*, the Ninth Circuit, after noting that the communications for which Burgess alleged he was fired related to matters of public concern and were protected by the First Amendment, found that Burgess had alleged a violation of a clearly established constitutional right. The Ninth Circuit went on to affirm the district court's denial of summary judgment on the issue of qualified immunity because there were genuine issues of material fact whether the Plaintiff's protected activities were a substantial factor in the discharge. In so ruling, the Ninth Circuit disregarded the employer's argument that its interest as a government employer in promoting the efficiency of public service outweighed the Plaintiff's First Amendment interest thereby entitling the employer to qualified immunity because the employer's motive was a matter of factual dispute.

In the court's opinion, that is exactly what the court is faced with here. *Burgess* disposes of Defendants' arguments that it could have justified disciplining Plaintiff under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) for actions of disloyalty in accessing Gonsalves' personal computer and making those documents public despite the fact that the documents involved matters of public concern.[3]

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was terminated for violating was unconstitutionally vague. 190 Cal.App.3d at 1435. *Martinez* has nothing to do with the legality of a dismissal allegedly in retaliation for the exercise of First Amendment rights.

[3]The court is somewhat bemused by this argument because it appears that defendants did not discipline plaintiff for that reason. Therefore, it seems that defendants are asking the court to grant them qualified immunity on the basis of something they argue they could have done but did not do.

Consequently, Defendants' motion is denied on this ground.

B. Second Cause of Action

Defendant Gonsalves moves for summary judgment in connection with the second cause of action for intentional infliction of emotional distress on the grounds that at all times he was acting within the course and scope of his duties and authorities as the District Attorney and is therefore entitled to governmental immunity, that Plaintiff has failed to exhaust administrative remedies, and that he did not engage in outrageous conduct nor have an intent to cause emotional distress with respect to the particular actions alleged to have been taken by him or at his behest.

In the timely filed opposition to this portion of Defendants' motion and at oral argument, Plaintiff makes clear that the only aspect of this portion of the motion she is contesting is that the record contains evidence sufficient to warrant trial on the issue of whether or not Gonsalves had Linda Briones make obscene telephone calls to Plaintiff.[4]

The court agrees with Defendant that the evidence upon which Plaintiff relies simply does not suffice to withstand summary judgment on this issue. In asserting that there is a genuine issue of material fact that Gonsalves had Linda Briones make obscene telephone calls to Plaintiff, Plaintiff refers the court to the evidence that Briones was employed by the Office of the District Attorney, that Briones got her job

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[4]Plaintiff does not address the issues of scope of authority and governmental immunity, requirement of exhaustion of administrative remedies, or the other actions upon which Gonsalves seeks summary judgment. Consequently, the court rules that plaintiff concedes Gonsalves' entitlement to summary judgment on those issues.

at the District Attorney's Office as a favor by Gonsalves to a Manuel Vierra, that Briones supported Gonsalves in the campaign, and that Briones is in a supervisory position although a Legal Clerk II does not have a supervisory duty attached to it. Plaintiff further refers the court to her deposition testimony wherein she repeatedly testified that she did not recognize the voice of the caller but thought or suspected that it might have been Linda Briones. In the court's opinion, this evidence simply does not raise any inference that Gonsalves directed anyone to make obscene telephone calls to Plaintiff, much less Briones. Plaintiff is only guessing that Briones made the calls and she has pointed to nothing that would indicate that Gonsalves even knew the telephone calls were being made, much less that he caused them to be made. In this regard, Defendants refer the court to *Mitchell v. Peralta Community College District*, 766 F.Supp. 834, 91 D.A.R. 9861, 9863 (N.D. Cal. 1991), wherein the district court stated in pertinent part:

> Third, plaintiff claims that the chair of the selection committee, Maureen Knightly Adams, was biased against her because she was a black female. The evidence offered in support of this charge is incompetent to establish this fact. Plaintiff cites to the deposition testimony of defendant White to show that both Knightly and her husband, Jerry Adams, made anonymous telephone calls to White spreading malicious rumors about plaintiff. White's deposition makes absolutely no reference to Knightly, but states only that 'maybe' Jerry Adams was one of the callers . . . Plaintiff's assertion that White believed Knightly was one of the hostile anonymous callers is flagrantly irresponsible. Moreover, that Knightly's husband may have telephoned White is no evidence that Knightly herself was prejudiced against Pearl Mitchell.

The court is faced with a similar situation here. Consequently, Defendant Gonsalves is granted summary judgment with respect to this allegation and with respect to the second cause of action.

ACCORDINGLY, IT IS ORDERED THAT Defendants' Motion for Summary Judgment is granted in part and denied in part as set forth herein.

DATED: October 7, 1991.

/s/
Robert E. Coyle
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-90-438 REC

ESTHER GALLEGOS,

Plaintiff,

v.

GARRY R. GONSALVES, *et al.*,

Defendant.

ORDER RE MOTIONS FOR RECONSIDERATION AND FOR LEAVE TO CERTIFY APPEAL

On November 4, 1991, the court heard Defendants' Motion for Reconsideration of Denial of Summary Judgment on Defendant's Defense of Qualified Immunity and Defendants' Motion for Leave to Certify the Denial of Summary Judgment as Appealable Pursuant to 28 U.S.C. §1292(b).

Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies these motions for the reasons set forth herein.

A. Motion for Reconsideration

Defendants move the court to reconsider its Order re Motion for Summary Judgment wherein the court denied Defendants' motion seeking qualified immunity contending that the court's ruling overlooks the fact that the law is

unclear as to whether or not Plaintiff's conduct in speaking to the newspaper and testifying to the grand jury concerning Gonsalves' use of the county computer system involved a matter of public concern. In so moving, Defendants merge this contention with the fact that Gonsalves sought the advice of County Counsel Eymil before terminating Plaintiff.

The fact that Gonsalves consulted with County Counsel before terminating Plaintiff does not *ipso facto* entitle Gonsalves to qualified immunity. Moreover, as noted in the court's order *Burgess v. Pierce County* precludes a grant of summary judgment on this issue in a mixed motive case, which this is.

Therefore, the motion for reconsideration is denied.[1]

B. **Motion for Leave to Certify the Denial of Summary Judgment as Appealable Pursuant to 28 U.S.C. §1292(b)**

Defendants move the court to certify that portion of its Order re Motion for Summary Judgment denying summary judgment in connection with the First Cause of Action for

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[1]At oral argument, defendants urged the court to review the United States Supreme Court's decision in *Mireles v. Waco*, 91 Daily Journal D.A.R. 12907 (October 21, 1991) in resolving this motion. The court is not persuaded that *Mireles* has any relevance to this motion or to the court's decision to deny summary judgment with respect to defendants' assertion of qualified immunity. *Mireles* involved absolute judicial immunity.

violation of the First Amendment for immediate appeal pursuant to 28 U.S.C. §1292(b).[2]

Although not mentioned by Defendants, it is clear that the Ninth Circuit will take jurisdiction pursuant to 28 U.S.C. §1291 of an interlocutory appeal from the denial of summary judgment in a civil rights action based on qualified immunity. *Bryant v. U.S. Treasury Dept., Secret Service*, 903 F.2d 717, 720 (9th Cir. 1990); *Ortiz v. Van Auken*, 887 F.2d 1366, 1367 (9th Cir. 1989). Consequently, to the extent that Defendants seek to certify an interlocutory appeal under Section 1292(b) of the court's denial of summary judgment with respect to qualified immunity, the motion is unnecessary.

Asserting that "[t]he issue of when, if ever, it is appropriate to grant summary judgment in a dual-motive case arising under 42 U.S.C. Section 1983 has never been definitively addressed by the Ninth Circuit," Defendants argue that this court should certify the denial of summary judgment in connection with the First Cause of Action because "it is imperative that the Ninth Circuit be given an opportunity to

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[2]28 U.S.C. §1292(b) provides in pertinent part as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in the order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is to be made to it within ten days after the entry of the order.

hear and decide a case where the facts are not in dispute, and to set forth an affirmative standard by which the trial courts can determine when summary judgment is appropriate in a dual-motive case."[3]

However, other than referring the court to the code section, Defendants do not set forth or discuss the requirements for certification of an immediate appeal under Section 1292(b). However, when those requirements are examined relative to the reason presented by Defendants for the certification under Section 1292(b), it is clear that certification is not appropriate and should be denied to the extent the statute is applicable.

A district court has discretion to certify an order for interlocutory appeal if all three of the following criteria are met:

(1) The order involves a controlling question of law;

(2) There is substantial ground for difference of opinion; and

(3) An immediate appeal from the order may materially advance the ultimate termination of the litigation. *Kern-Tulare Water District v. City of Bakersfield*, 634 F.Supp. 656, 667 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). "[Section 1292(b) is] to be used only in exceptional cases where decision of an interlocutory appeal might avoid protracted and expensive litigation. It [is] not intended merely to provide review of

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[3]By asserting that the facts are not in dispute, defendants are referring only to the facts of plaintiff's misuse of the County computers.

difficult rulings in hard cases." *United States Rubber Company v. Wright*, 359 F.2d 784, 758 (9th Cir. 1966).

1. Controlling Question of Law

In *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982), the Ninth Circuit held that "all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."

It is clear to the court that the issue sought to be certified is not "controlling" under this test. In this regard, Defendants are asking the court to certify an issue because the Ninth Circuit has not ruled on it. However, this is not grounds for certification of an interlocutory appeal.

2. Substantial Ground for Difference of Opinion

For essentially the same reasons, Defendants have not satisfied this requirement either. "[S]trong disagreement with a ruling does not mean that there is 'substantial ground' for difference of opinion." *Kern-Tulare Water District, supra*, 634 F.Supp at 667. "Moreover, §1292(b) was not intended merely to provide an avenue for review of difficult rulings in hard cases, and the mere fact that there is a lack of authority on a disputed issue does not necessarily establish some substantial ground for a difference of opinion under the statute." *Federal Deposit Ins. v. First Nat. Bank of Waukesha*, 604 F.Supp. 616, 620 (E.D. Wisc. 1985).

3. Materially Advance the Ultimate Termination of Litigation

The court does not think that Defendants have satisfied this requirement either. This is because the resolution of the issue of qualified immunity may well make resolution of the First Amendment violation moot. Secondly,

interlocutory appeal of denial of summary judgment will always materially advance the ultimate termination of the litigation. However, this fact does not mean anything in the absence of the exceptional case.

ACCORDINGLY, IT IS ORDERED that Defendants' Motion for Reconsideration of Denial of Summary Judgment on Defendant's Defense of Qualified Immunity is denied.

IT IS FURTHER ORDERED that Defendants' Motion for Leave to Certify the Denial of Summary Judgment as Appealable Pursuant to 28 U.S.C. §1292(b) is denied.

DATED: November 19, 1991.

/s/
Robert E. Coyle
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-90-438 REC

ESTHER GALLEGOS,

Plaintiff,

v.

GARRY GONSALVES, *et al.*,

Defendant.

ORDER DENYING REQUEST TO CONSIDER LIMITED REMAND

On February 4, 1992, Plaintiff requested that this court indicate whether it would be willing to entertain the issue of qualified immunity upon what the court presumes would be a second motion for reconsideration if the Ninth Circuit remanded the case for that limited purpose.

The court has considered the arguments of the parties as presented in their respective letters to the court. The court is not willing to entertain the motion.

DATED: February 13, 1992.

/s/
Robert E. Coyle
United States District Judge

APPENDIX E

Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16759

GARRY S. GONSALVES[1],

Plaintiff/Appellant,

v.

ESTHER GALLEGOS,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Robert E. Coyle, District Judge, Presiding

Argued and Submitted: April 15, 1993

Filed: July 2, 1993

Before: MARY M. SCHROEDER, HARRY PREGERSON, and DOROTHY W. NELSON, Circuit Judges.

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[1]Appellant's actual name is Garry R. Gonsalves.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

No. CV-F-90-438 REC

ESTHER GALLEGOS,

Plaintiff,

v.

GARRY R. GONSALVES, *et al.*,

Defendant.

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

(42 U.S.C. §1983, Intentional Infliction of Mental Distress)

Plaintiff Esther Gallegos hereby amends her complaint filed in this matter as follows:

JURISDICTION, CLAIMS, PARTIES, COMMON TO ALL COUNTS

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343.

2. Plaintiff is a natural person and is a Citizen of the United States and of the State of California. Plaintiff is an individual residing at Hanford, Kings County, California. Her date of birth is April 21, 1947.

3. The Defendants are Kings County, California, a General Law County in the State of California, and Garry R. Gonsalves, an individual resident of Kings County, California.

4. This action includes a claim to redress the deprivation of Plaintiff's civil rights by Defendants who are a political subdivision of the State of California and an official of that political subdivision, individually and as such an official, acting under color of state law, statutes, ordinances, and regulations.

5. Plaintiff is further seeking damages from Defendant Garry R. Gonsalves pursuant to the Laws of the State of California providing liability for tortious conduct. State and federal claims hereinafter set forth derive from a common nucleus of operative facts.

COUNT I

Deprivation of Rights Under 42 U.S.C. §1983

6. Plaintiff realleges and incorporates herein each and every allegation contained in paragraphs 1 through 4 of this complaint.

7. Plaintiff entered the service of Defendant County of Kings on December 18, 1978 and was continuously in such service since that date until July 5, 1990.

8. Since on or about 1985, Plaintiff has been employed by Defendant County of Kings in the capacity of Legal Clerk III within the Office of the District Attorney.
On or about 1985, Plaintiff's employment with Defendant County of Kings in the capacity of Legal Clerk III became permanent, pursuant to the terms and conditions of a collective bargaining agreement to which Plaintiff and Defendant County of Kings was a party.

9. Since on or about January 3, 1987, Defendant Garry R. Gonsalves is and has been the District Attorney, County of Kings and the head of the Office of the District Attorney.

10. Since on or about January 1, 1990, Defendant Garry R. Gonsalves and County of Kings, California had a practice and/or policy that no employee may speak about any wrongful acts of any person in the employ of the County of Kings in a position superior to that of the employee and that practice and/or policy provided that any person in violation thereof would have their employment with the County of Kings terminated and would be threatened with criminal prosecution.

11. On or about May 15, 1990, Plaintiff exercised her rights to free speech secured to her under the First Amendment of the United States Constitution by stating truthfully to the Kings County Grand Jury that Defendant Garry R. Gonsalves had improperly used resources of the County of Kings, California for his own personal gain.

12. On or about May, 1990, Plaintiff exercised her rights to free speech secured to her under the First Amendment of the United States Constitution by stating to the Hanford, California *Sentinel* Newspaper truthfully of instances wherein Defendant Garry R. Gonsalves had improperly used resources of the County of Kings, California for his own personal gain.

13. Purporting to exercise the administrative and/or investigative authority vested in the District Attorney of the County of Kings, California and the authority vested in the District Attorney as the head of the department of the District Attorney, Kings County, California, but in excess of the scope and course of that authority, and in furtherance of the policy and/or practice as set forth in paragraph 10, hereof, Defendants Garry R. Gonsalves and County of Kings,

California, caused an investigation to be made against Plaintiff, threatened to institute criminal proceedings against Plaintiff, and commenced an administrative proceeding against Plaintiff to terminate her employment with the County of Kings.

14. The direct and proximate result of this actions by Defendant Garry R. Gonsalves and the County of Kings was that on or about July 12, 1990 Plaintiff resigned her employment with the County of Kings fearing that she would be further prosecuted administratively and civilly in retaliation for her exercise of her rights as hereinabove set forth.

15. By reason of the wrongful actions of the Defendants as aforesaid, Plaintiff has been injured in her mind and emotions, as well as in her ability to obtain employment and earn her living. As a direct and proximate result of these wrongful actions, Plaintiff has incurred medical expenditures in the approximate amount of $500 and will continue to incur medical expenditures in an amount according to proof. As a further direct and proximate result of these wrongful actions, Plaintiff has sustained and will continue to sustain income loss in an amount according to proof. As a further direct and proximate result of these wrongful actions, Plaintiff has sustained mental and emotional pain and suffering and distress all to her general damage in the approximate amount of $250,000. None of the aforesaid damages have been paid.

16. The acts complained of hereinbefore were wilful, unlawful, malicious, and in wanton disregard of the rights and feelings of Plaintiff, and by reason thereof Plaintiff demands exemplary or punitive damages against Defendant Garry R. Gonsalves in the sum of $1,000,000.

WHEREFORE, Plaintiff prays judgment as hereinafter set forth.

COUNT II

Intentional Infliction of Mental Distress

17. Plaintiff realleges and incorporates herein each and every allegation contained in paragraphs 1, 2 and 5 of this complaint.

18. In doing the things alleged in this count, Defendant Garry R. Gonsalves was acting outside the scope of his employment as the District Attorney, County of Kings, California and was engaged in a course of conduct not authorized or foreseeable from his employment relationship with the County of Kings. In doing the thir gs alleged in this count, Defendant Gonsalves was not acting for the purpose of performing a task or duty statutorily imposed upon him as a public officer, nor was he engaged in performing acts reasonably related to the performance of a task or duty statutorily imposed upon him as a public officer.

19. On or about May 19, 1990 Plaintiff advised the Kings County Grand Jury and the Hanford, California *Sentinel*, that Defendant Garry R. Gonsalves had appropriated to his personal use the resources of Kings County, California. Plaintiff's statements were a lawful exercise of her duty as an employee of the County of Kings, California and as a citizen of the United States and of the State of California.

20. On or about May 19, 1990 Defendant Garry R. Gonsalves, learned of the fact that Plaintiff made these statements and, out of personal ill will and/or malice to Plaintiff, engaged upon a course of action to retaliate against Plaintiff by intentionally doing acts or causing acts to be done which were calculated to cause Plaintiff to suffer extreme mental anguish.

21. The acts done by or at the express instance of Defendant Garry R. Gonsalves in pursuit of the course of

action set forth in the foregoing paragraph included, but were not limited to causing Plaintiff's fellow employees to have negative or unpleasant contacts with Plaintiff, causing Plaintiff's fellow employees to ostracize her during and after employment hours, making threatening and/or obscene telephone calls to Plaintiff, contacting Plaintiff's friends and family to imply to them that Plaintiff was a dishonest person who should not be trusted, directing Plaintiff to perform humiliating and degrading tasks that were not related to Plaintiff's employment and were not intended to advance or further the interests of Plaintiff's or Defendant Gonsalves' employers.

22. Defendant Garry R. Gonsalves' conduct was intentional and malicious and done solely for the purpose of causing Plaintiff to suffer mental anguish, emotional and physical distress.

23. As a proximate result of the aforementioned acts, Plaintiff was forced to resign her employment, suffered humiliation, degradation, mental anguish, and emotional and physical distress and has been injured in her mind and body.

24. By reason of the wrongful actions of the Defendants as aforesaid, Plaintiff has been injured in her mind and emotions, as well as in her ability to obtain employment and earn her living. As a direct and proximate result of these wrongful actions, Plaintiff has incurred medical expenditures in the approximate amount of $500 and will continue to incur medical expenditures in an amount according to proof. As a further direct and proximate result of these wrongful actions, Plaintiff has sustained and will continue to sustain income loss in an amount according to proof. As a further direct and proximate result of these wrongful actions, Plaintiff has sustained emotional pain and suffering all to her general damage in the approximate amount of $250,000. None of the aforesaid damages have been paid.

25. The acts complained of hereinabove were wilful, unlawful, malicious, and in wanton disregard of the rights and feelings of Plaintiff, and by reason thereof Plaintiff demands exemplary or punitive damages against Defendant Garry R. Gonsalves in the sum of $1,000,000.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For medical expenditures in the amount of $500, or according to proof;

2. For income loss in an amount according to proof;

3. For general damages in the amount of $250,000;

4. For punitive damages in the amount of $1,000,000, or what the court will allow; and

5. For costs, expert witness fees, attorney's fees, and such other and further relief as the Court deems proper.

DATED: March 5, 1991.

/s/
William A. Romaine
Attorney for Plaintiff

APPENDIX G

Text of Statutes Involved

United States Code, The Public Health and Welfare

42 U.S.C. Section 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.